BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corporation

* Counsel of Record

[Other counsel for petitioners are listed on the inside front cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

ROBERT H. COMPTON
ASHLAND PETROLEUM COMPANY
P.O. Box 391
Ashland, Kentucky 41114
(606) 329-3725

JAMES W. SHADDIX
PENNZOIL COMPANY
P.O. Box 2967
Houston, Texas 77001
(713) 546-8431

RALPH J. MAYNARD
ALFRED B. SMITH, JR.
TENNECO OIL COMPANY
P.O. Box 2511
Houston, Texas 77002
(713) 757-4249

ERIC SCHWARTZ
TOSCO CORPORATION
2401 Colorado Avenue
Santa Monica, California
90406-2401
(213) 207-7083

THOMAS A. DONOVAN
JUDITH A. MACKAREY
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
Counsel for
Ashland Oil, Inc.

JOHN P. MATHIS
CATHERINE C. WAKELYN
BAKER & BOTTS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 457-5500
Counsel for
Pennzoil Company and
Tenneco Oil Company

KENNETH L. BACHMAN, JR.
EUGENE M. GOOTT
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Tosco Corporation

TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. The Award to State Governments Approved by the Court of Appeals is Not Restitution	2
2. The Court of Appeals Contravened a Statute, Decisions of This Court, and Decisions of other Courts of Appeals in Approving the Denial to Petitioners of a Hearing on the Remedy Issue	4
3. A Hearing on the Remedy was Particularly Important in This Case	6
4. The Government Concedes that a Critical Factual Issue Exists	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 4

Bulzan v. Atlantic Richfield Co., 620 F.2d 278 (TECA 1980) 3, 4

Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717, *cert. denied*, 459 U.S. 844 (1982) 3

Donovan v. University of Texas, 643 F.2d 1201 (5th Cir. 1981) 4, 6

Federal Power Commission v. Interstate Natural Gas Co., 336 U.S. 577 (1949) 3

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 9

Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971) 4, 6

Hodgson v. Quinada, 498 F.2d 5 (9th Cir. 1974) 4, 6

Marshall v. Quik-Trip Corp., 672 F.2d 801 (10th Cir. 1982) 4, 6

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 3, 5

Sauder v. DOE, 648 F.2d 1341 (TECA 1981) 3

U.S. CODE:

28 U.S.C. § 2041 ..... 2, 4, 5

28 U.S.C. § 2042 ..... 2, 4, 5-6

OTHER STATUTES:

§ 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 note 1, 4

Warner Amendment, Pub. L. No. 97-377, 96 Stat. 1830 (1982), Section 155 ..... 7, 8

LEGISLATIVE MATERIALS:

128 Cong. Rec. 51570, col. 1 (daily ed. Dec. 20, 1982) 8

H.R. 4972, 98th Cong., 2d Sess. 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-430

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

INTRODUCTION

The statute governing this action, § 209 of the Economic Stabilization Act, requires the court to order "restitution" to those injured by the overcharges. All courts and parties who have considered the question agree that at least initially petitioners and other refiners were forced to bear the two-billion-dollar cost of the HFU overcharges. In this case the court of appeals:

1. held that "restitution" does not require that money be restored to those injured, but may be paid to state governments who have not shown injury, contrary to decisions of this Court in situations indistinguishable from the present;

2. held that even though it was not clear who had been injured by the overcharges, no hearing on that question need be held before awarding the money to state governments, contrary to decisions of this Court and the command of 28 U.S.C. §§ 2041, 2042, and in conflict with the decisions of other courts of appeals interpreting those statutes;

3. agreed with the federal government's argument that holding a hearing to determine who had been injured by the HFU overcharges would be futile even though (a) the Department of Energy's Office of Hearings and Appeals had found after a hearing that it was possible to do so and that petitioners had been injured and (b) senior DOE officials had forced suppression and alteration of those findings because it is the government's "policy" to defeat restitution to persons injured and instead to obtain similar overcharges for the federal treasury.

4. granted summary judgment on the remedy issue even though, as the government now concedes, an issue of fact existed with respect to $1 billion even under the rationale adopted by the court of appeals.

The oppositions to certiorari do not seriously controvert any of these showings.

1. The Award to State Governments Approved by the Court of Appeals Is Not Restitution.

Without dealing directly with the authority cited in the Petition, the government's opposition seeks to justify the decision below on the basis of TECA's view that the "central purpose" of restitution is only to make the wrongly enriched person disgorge the amount of the enrichment, and that repayment to the victim is unnecessary. Govt. Opp. 32.[1]

---

[1] In this reply, we refer to the Brief for the United States in Opposition as "Govt. Opp." and the Brief for the State Respondents

As we pointed out in the Petition (at 15-16), however, this view contradicts holdings of this Court in *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) and *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577, 582 (1949), that restitution means restoration of the *status quo* by "the *return* of that which rightfully belongs to the purchaser. . . ." and cannot be effected "by payment of the fund to those who show no loss. . . ."

Thus the government has succeeded only in emphasizing that the view of restitution taken by the court of appeals is unique and in conflict with holdings of this Court and other authority, such as the Restatement of Restitution.[2]

---

as "State Opp.". We refer to the Appendix to the Petition in No. 85-429 as "Ex. App." and the Appendix to the present Petition as "Pet. App."

Lists of parent, affiliate and subsidiary companies required by this Court's Rule 28.1 appear in Appendices VIII-X to the Petition.

[2] TECA's own citation of authority for its treatment of this question is dubious. In the present case, it relied upon its earlier characterization of restitution in *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722, *cert. denied*, 459 U.S. 877 (1982). See Ex. App. 91a. On the page of the *Citronelle* opinion thus cited, there is a 10-line indented quotation that TECA identified as coming from comment e to Section 1 of the Restatement of Restitution, beginning "Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense. . . ." However, that purported quotation is completely inaccurate. No such language is found at the cited portion, or, we believe, anywhere else in the Restatement, which, to the contrary, states that compensation of the person injured is the basis of restitution. See Pet. 16 n. 10. Nor do the other cases cited by the government provide any support for TECA's conclusion that compensation of the person injured is not a primary goal of restitution. In *Sauder v. DOE*, 648 F.2d 1341 (TECA 1981), it was taken as beyond question that restitution to the person overcharged would be made. The quotation from *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (TECA 1980), at page 34 of the government's brief is misleading. The beginning of that sentence, not quoted by the

The government does assert that the remedy was justified as an exercise of broad equitable jurisdiction (Govt. Opp. at 28). But as this Court has held, for all the " 'flexibility' " of equity jurisprudence, ". . . when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (footnote and internal citation omitted). Here, Congress has made it clear that it intended by use of the term restitution to authorize return of the overcharge funds to those who originally paid them. Pet. 15. Invocation of equity powers cannot serve to alter that command.

2. The Court of Appeals Contravened a Statute, Decisions of This Court, and Decisions of Other Courts of Appeals in Approving the Denial to Petitioners of a Hearing on the Remedy Issue.

a. The government's opposition fails to mention 28 U.S.C. §§ 2041, 2042, which were designed by Congress to apply where, as here, entitlement to funds in court is unclear after litigation. Pet. 16-17. At least six other courts of appeals have applied these provisions in similar circumstances. *Id.* at 17. Several of those cases were government enforcement actions, indistinguishable from the present, in which the identity of the persons entitled to compensation was unclear at the termination of the action. *Marshall v. Quick-Trip Corp.*, 672 F.2d 801, 807-8 (10th Cir. 1982); *Donovan v. University of Texas*, 643 F.2d 1201, 1208 n. 16 (5th Cir. 1981); *Hodgson v. Y. B. Quinada*, 498 F.2d 5, 6 (9th Cir. 1974); *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535-536 (3d Cir.

---

government, explicitly states that it refers to "administraitve remedies," not the judicial remedy of § 209. *Bulzan* does not concern § 209.

1971). The government has not even tried to deal with this conflict.

b. Independently of 28 U.S.C. § 2041, this Court's decisions also required that petitioners be given the opportunity to show injury before a remedy was chosen by the district court. The government's attempt to avoid the effect of these cases is not successful. The government first asserts that petitioners could have no proper role in a government enforcement action (Govt. Opp. 32). But petitioners were not seeking to participate in the enforcement aspects of the case. They attempted to participate on remedy issues only if it developed that those issues would actually be presented (i.e., if liability were first established). Petition at 5-6.

This approach was correct. In *Porter*, which was itself a federal government action brought to enforce price control regulations, this Court specifically addressed the situation now presented:

> [The district court] may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; *if necessary, persons not originally connected with the litigation* may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances.

328 U.S. at 398 (emphasis added).[3] Similarly, 28 U.S.C.

---

[3] The government answers only that this statement was not part of the holding in *Porter*. Govt. Opp. at 33. But the quoted portion was not an offhand remark. It was an integral part of the Court's general holding that a district court's full equity powers are available in such cases as the present as long as they are exercised consistently with "clear and valid legislative command[s]." 328 U.S. at 398. Indeed the states essentially admit (State Opp. at

§ 2042 authorizes petitions to be filed claiming entitlement to funds already "deposited in court." Other courts of appeals have already anticipated filing of petitions to be filed by non-parties at the conclusion of government enforcement cases. See *Quick-Trip, University of Texas, Y.B. Quinada,* and *Wheaton Glass, supra* at 4.[4]

3. A Hearing on the Remedy was Particularly Important in This Case.

a. We submitted the Supplemental Brief in support of certiorari to show that the court of appeals was wrong to have concluded that no hearing on remedy was necessary because as a matter of law it was impossible to identify those injured by the HFU overcharges. The government has failed to negate that showing.

The government's primary claim is that the Supplemental Brief is based on "incompetent and irrelevant evidence." Govt. Opp. at 31 n. 30. This, however, is hollow bluster. The government fails to point out that the DOE has since been compelled to make public the

---

22-23) that this language on equitable powers was intended to underscore the court's power to bring in other parties and to encompass other claims so as to work complete justice. That it has long been an attribute of equity that additional parties be brought in as their interest appears was shown in the Petition at 15 n.9.

[4] For this reason, the assertions of the federal government (Opp. at 27 and n.27) and the States (at 28-29) that the attempted intervention came too late are wide of the mark. While it is true that some petitioners did not seek intervention until after the district court had issued its Memorandum and decision of March 25, 1983, that is because the district court prevented them from doing anything else. See Pet. 5-6, 9. In finally granting intervention, the district court found that intervention was timely because the court itself had delayed participation of intervenors until the entire case had been decided: "In this case the court, at the request of DOE and Exxon, had stayed earlier motions to intervene by industry applicants pending resolution of the issue of Exxon's liability for the overcharges." Pet. App. 9a. The court of appeals noted this point. Ex. App. 82a n.45.

full original OHA report.[5] The text of that report contains all of the material quoted in Rep. Dingell's letters and confirms everything he said about it. DOE's own letter to Rep. Dingell confirmed his assertions that DOE had forced OHA to change its findings and conclusions for "policy" reasons. Supplemental Brief at 6, 10a-15a.[6]

b. The district court invoked a remedy—payment to the states—which was not urged by any party then before it and has no support in the record. The federal government and the states seek to support the remedy by referring to the intention of Congress in enacting the Warner Amendment. Govt. Opp. 31; State Opp. 18-22. This merely emphasizes that the district court acted as a legislature, not a court, in effect enacting a tenfold increase in a statute of Congress. Moreover, the sponsor of the Warner Amendment in the Senate and the Chairman of the Energy and Commerce Committee in the House both insisted in debate that enactment of the Amendment was not to serve as a precedent for disbursement of additional funds. Pet. 19, n. 16. Thus, there was no basis for judicial extension of that law.[7]

---

[5] A full copy of this 93-page report is being lodged with the Clerk.

[6] The government does not deal with any aspect of the showing in the Petition (at 13-14, 17) and Supplemental Brief that its role in the remedy issue has been improperly dominated by its desire to defeat the claims of others and obtain future funds for itself. Nonetheless, the government does refer pointedly to DOE's "Statement of Restitutionary Policy as it would apply to future cases (Govt. Opp. at 28), although without mentioning that the substance of that policy is to obtain those overcharges for the federal treasury. See Pet. 13, n.8. Finally, the proposed legislation referred to by the government (Govt. Opp. 28) was H.R. 4972, 98th Cong., 2d Sess. There was never any hearing, debate, or vote on that bill, and it died at the end of that session. There is no legislative activity on this issue in the 99th Congress.

[7] The government's citation of a floor statement by Senator Kennedy is unavailing (Govt. Opp. 31 n.31). Senator Kennedy

4. The Government Concedes that a Critical Factual Issue Exists.

The court of appeals based its approval of the remedy on the finding that as a matter of law the system of price controls on all refined products "was designed to insure that" increased costs of crude oil "would be passed along [by refiners] to the ultimate consumers," and that the complexity of those controls made the tracing of passthrough of injury futile. Ex. App. 87a, 89a. The Petition shows that because half (by volume) of all refined products were not covered by price controls, the rationale of the court of appeals in approving the remedy does not apply as to about half of the overcharges. Pet. 22-23.

The government has been forced to agree that half of refined products were not covered by price controls. Govt. Opp. at 29 n. 28. It effectively concedes that the rationale of the court of appeals was wrong as to half of the amount of the remedy in this two-billion-dollar case. Further, the government expressly admits that as to this unregulated half of refiner sales, it is a question of fact whether cost passthrough occurred. It does this by claiming that the lack of a regulatory mechanism as to uncontrolled products "does not mean that the additional costs were not *in fact* passed through. . . ." Govt. Opp. at 29 n. 28 (emphasis added).[8] Thus the government

---

described the Warner Amendment as authorizing DOE to distribute "up to $200 million" and said about its intent, "The conferees did not specifically address the disbursement of other funds collected as a result of overcharges." 128 Cong. Rec. S1570, col. 1 (daily ed. Dec. 20, 1982). This is consistent with statements of the Senate and House leaders that the Amendment was not intended to serve as a basis for future disbursements.

Indeed, the government's point appears to be the nonsensical one that because the Warner Amendment does not explicitly bar the remedy ordered in the present case, it must be read as authorizing it.

[8] The government then argues that the difficulty of ascertaining whether refiners passed through cost increases to their customers

concedes that a billion-dollar fact issue was resolved without a hearing.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

ROBERT H. COMPTON
ASHLAND PETROLEUM COMPANY
P.O. Box 391
Ashland, Kentucky 41114
(606) 329-3725

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corporation

THOMAS A. DONOVAN
JUDITH A. MACKAREY
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500
Counsel for
Ashland Oil, Inc.

* Counsel of Record

---

should bar refiners from recovering, citing Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). That case holds exactly the opposite. Under it party—or even an entire industry—forced to pay an illegally high price (as refiners were forced by DOE's entitlements regulations to pay the cost of the HFU overcharges) may not have its recovery defeated by the possibility that market forces may have permitted that person or industry to pass those increased costs on. *Id.* at 491-494.

JAMES W. SHADDIX
PENNZOIL COMPANY
P.O. Box 2967
Houston, Texas 77001
(713) 546-8431

RALPH J. MAYNARD
ALFRED B. SMITH, JR.
TENNECO OIL COMPANY
P.O. Box 2511
Houston, Texas 77002
(713) 757-4249

ERIC SCHWARTZ
TOSCO CORPORATION
2401 Colorado Avenue
Santa Monica, California
90406-2401
(213) 207-7083

JOHN P. MATHIS
CATHERINE C. WAKELYN
BAKER & BOTTS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 457-5500
Counsel for
Pennzoil Company and
Tenneco Oil Company

KENNETH L. BACHMAN, JR.
EUGENE M. GOOTT
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700
Counsel for Tosco Corporation